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Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-112

In The

Supreme Court of the United States

October Term, 1987

UNITED BROTHERHOOD OF CARPENTERS AND JOINTERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPENTICESHIP AND TRAINING FUND,

Petitioner and Cross-Respondent,

vs.

ENDICOTT ENTERPRISES, INC.,

Respondent and Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it an abuse of discretion for a district court to award attorney's fees that are authorized by statute after the district court specifically finds that a litigant's position was "frivolous, unreasonable, and without foundation."?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the same as referred to in respondent and cross-petitioner's brief opposition to the petition for writ of certiorari.

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OPINIONS BELOW

The Opinion of the Ninth Circuit United States Court of Appeals is reported at 806 F.2d 918 (9th Cir. 1986), and is printed in Appendix A to Petitioner's Petition for Writ of Certiorari at p. 1-13. The Judgment and Memorandum Decision of the United States District Court, District of Alaska, is printed in Petitioner's Appendix p. 31-37. The District Court's Minute Order on Attorney's Fees is printed in the Appendix to this Cross-Petition at p. 1.

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JURISDICTION

The Judgment of the Nnith Circuit United States Court of Appeals was entered on December 19, 1986. Petition for Rehearing to the Ninth Circuit was denied on March 25, 1987. A Petition for Writ of Certiorari to this Court was received by Respondent and Cross-Petitioner on July 16, 1987. Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 19.5.

———o———

STATUTES INVOLVED

1. Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f):

> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be en-

gaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final provision to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (2) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

2. 29 U.S.C. § 1132(g)(1):

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (a),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

———o———

STATEMENT OF THE CASE

Cross-Petitioner relies on the statement of the case presented in its brief in opposition to the petition for certiorari.

———o———

REASONS FOR GRANTING THE WRIT

I. The Appellate Court usurped the role of the District Court in reversing the District Court's award of attorney's fees.

The District Court for the District of Alaska awarded the Endicotts their full costs and attorneys fees in defending against what the court termed a "frivolous" action brought by the Union. This award was made pursuant to 29 U.S.C. Sec. 1132(g)(1), which authorizes the imposition of attorneys fees, at the trial court's discretion, against the losing party in ERISA cases.

The Ninth Circuit Court of Appeals reversed this decision, and held that the District Court abused its discretion by awarding attorneys fees to the Endicotts. The Court of Appeals admitted that the District Court had applied the proper factors and caselaw in arriving at its decision. It further noted that the District Court had found the Union's claim to be "frivolous, unreasonable and without foundation." 806 F.2d at 923 (Petition for Cert. Appendix at p. 11). But despite these findings, the Court of Appeals decided that the District Court had abused its discretion. This holding was in error and so far departs from the usual course of judicial proceedings that this Court's power of supervision should be exercised to correct it.

A. The District Court's Holding Was Correct

The decisions of trial courts on matters regarding attorneys fees should be granted great deference by appellate courts. This principle has been repeated time and again by this Court. In *Hensley v. Eckerhart,* 461 U.S.

424 (1983), for example, this Court considered a claim for attorneys fees in a class action by inmates of a state hospital. While holding that the District Court erred in not reducing the amount of attorneys fees because the plaintiffs had not succeeded on all counts, this Court emphasized that "the District Court has discretion in determining the amount of a fee award. This is appropriate in view of the District Court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." 461 U.S. at 437.

The Court of Appeals in the case at hand did not defer to the District Court's superior understanding of the litigation. The District Court had the benefit of full briefing on the attorneys fees issue, which was separately argued and separately decided. The appellate court was not present throughout the litigation, and was therefore ill equipped to review what this Court has described as "essentially factual matters". As a result, the appellate court's finding of an abuse of discretion is not supported by the facts.

Those facts show, among other things, that the work performed on the downtown building site was done openly and with the full knowledge of the Union; that the Union attempted to organize the workers on that site, and when that effort failed, the Union picketed the site in an attempt to force Mr. Endicott to sign a collective bargaining agreement; when *that* effort failed, the Union sued the Endicotts. These facts, as set forth in the depositions and affidavits of the Endicotts and others (see Appellate Excerpt of Record at p. 89), were never refuted or even denied by

the Union. Furthermore, these facts were known to the Union at the time it filed its lawsuit.

The District Court was keenly aware of this background to the litigation, and the fact that the Union did nothing to pursue its claim for eighteen months, until it was forced to respond to the Endicott's summary judgment motion. The District Court was in a position to recognize that the lawsuit had been filed in a final attempt to force the Endicotts to sign a compliance agreement covering the downtown site. These facts convinced the court that the Union had acted unfairly and filed a frivolous lawsuit. Accordingly, it awarded the Endicotts their attorney's fees for defending themselves against unfair oppression by the Union.

B. The District Court Applied The Proper Standard

The only reason given by the appellate court for reversing the attorneys fee award was that the issue of what constitutes repudiation was "unsettled" and an "open question" after this Court's ruling in *McNeff v. Todd,* 461 U.S. 260 (1983). The Court of Appeals went on to say that there was "no evidence of bad faith" and that the Union's suit was not "the kind of vexatious litigation meant to be deterred by the imposition of attorneys fees." 806 F.2d at 923. These conclusions are contrary to the established law governing the award of ERISA attorneys fees and misconstrue the tenor of the District Court's minute order.

The District Court determined that the facts in the *Endicott* case were "nearly identical to those of *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501 (9th

Cir. 1984)." (Appendix to Cross-Petition at p. 1). In *Gilliam,* the Federal District Court for the Central District of California awarded attorneys fees against the Engineers Trust Fund, because it found the lawsuit pursued by the Fund was "grossly unfair, that the trust funds had substantial ability to satisfy the fee award, that the assessment of fees would deter unfair acts, and that the position taken by the Trust Funds was without merit." 737 F.2d 1506. The District Court in this case must have believed that the Union's conduct was unfair, since it found that the facts were "nearly identical" to the situation presented by *Gilliam.* It did not, however, make an explicit finding that the Union had acted in bad faith. That was not and is not the standard for an award of attorneys fees under 28 U.S.C. § 1132(g). Even so, if the District Court had known that the Court of Appeals would require a finding of bad faith, it might have made a finding to that effect. Instead, the District Court contented itself with citing *Gilliam* and finding that the Union's position was "frivolous, unreasonable and without foundation."

This finding by the District Court was more than enough to justify the award of attorneys fees. The words used by the District Court were not idly chosen. This language echoes the holding of this Court in *Christianburg Garment Company v. Equal Employment Opportunity Commission,* 434 U.S. 412 (1978). In *Christianburg,* this Court established the standard for an award of attorneys fees in Title VII cases as follows: "a district court may in its discretion award attorneys fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421.

This standard for the award of attorneys fees is even stricter than what the Ninth Circuit and other federal courts have established for the award of attorneys fees in ERISA cases. The factors that govern an award of attorneys fees in ERISA cases are set forth in *Carpenters Southern California Administrative Corporation v. Russell*, 726 F.2d 1410 (9th Cir. 1984):

(1) the degree of the opposing party's *culpability or bad faith;*

(2) the ability of the opposing party to satisfy an award of fees;

(3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances;

(4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan, or to resolve a significant legal question regarding ERISA; and

(5) the relative merits of the parties' positions.

726 F.2d at 1415 (emphasis added). The District Court here explicitly acknowledged that it was applying these factors. The Court of Appeals did not deny that the District Court had done so. Instead, it set up a new barrier to the award of attorneys fees by holding that it was necessary to show bad faith in cases of unsettled law before attorneys fees would be awarded.

This is unfair to the Endicotts, who, as the owners of a small family business, must now bear the expense of the Union's ill-advised litigation. There is no reason why the Endicotts should have to pay to educate a labor union in matters of labor law. Nothing in existing law demands

that a prevailing party in an ERISA case show bad faith before it can be awarded its attorneys fees. Even if such a requirement existed, the record reveals that the Union filed its complaint in a blatant attempt to bully the Endicotts into signing a compliance agreement. Such coercion satisfies most definitions of bad faith. The Ninth Circuit had already set out the factors to be considered by district courts; the District Court in this case considered those factors; the Court of Appeals should not now be permitted to change its mind about the factors that need to be applied.

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II. CONCLUSION

This Court should grant the cross-petition for certiorari and reverse the holding on the attorneys fees issue. In the alternative, this Court should remand to the District Court for further findings on the issue of bad faith. As this Court has noted, "the element of bad faith of the defendant is simply one of many considerations best addressed to the sound discretion of the District Court." *Hall v. Cole,* 412 U.S. 1, 15 (1973). Whether or not there was bad faith is a question that the District Court should be permitted to determine for itself.

This cross-petition should be granted because the Court of Appeals has fundamentally departed from an accepted rule of law. It has imposed an unfair burden upon the Endicotts in forcing them to defend themselves from what the District Court has already called a frivolous, unreasonable and foundationless action. In the interet of fairness, this Court should not place the financial burden

of establishing new labor law precedent upon Warren and Marian Endicott, who employel only one union member in their entire lives, and who have already endured substantial hardship as a result.

RESPECTFULLY SUBMITTED this 12 day of August, 1987.

FAULKNER, BANFIELD, DOOGAN & HOLMES

William B. Rozell
of Attorneys for Respondent,
Endicott Enterprises, Inc.

APPENDIX

MINUTES OF THE UNITED STATES
DISTRICT COURT
DISTRICT OF ALASKA

TRUSTEES FOR THE ALASKA
CARPENTERS HEALTH & SECURITY
FUND, et. al vs. ENDICOTT ENTERPRISES, INC.

THE HONORABLE JAMES A. VON DER HEYDT

CASE NO. J83-005 CIV

Deputy Clerk	*Reporter*	*Recorder*
— Jim Meyers	— Janis Roller	— Marvel Hansbraugh
X Colleen Cannon	— ————	— David Thomas
— Ida Romack		— ————
— ————		

APPEARANCES: PLAINTIFF:
DEFENDANT:

PROCEEDINGS: *MINUTE ORDER FROM CHAMBERS:*

The court finds that plaintiffs' action was frivolous, unreasonable, and without foundation. Having reviewed the factors stated in *Carpenters Southern California Administrative Corporation v. Russell,* 726 F.2d 1410, 1415 (9th Cir. 1984), the court find that defendant's motion for attorneys fees should be granted, and accordingly awards full attorneys fees. The facts of this case are nearly identical to those of *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501 (9th Cir. 1984). Based on *Gilliam,* the court finds that such an award of fees is allowable.

Filed June 6, 1985
United States District Court
District of Alaska

Cy to ensl 6/6/85-vg

DATED: ———— INITIALS: ————
Deputy Clark